U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC9803752392 Office: Vermont Service Center Date: AUG 31 2000

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

Public Copy

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

IN BEHALF OF PETITIONER: [redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: Approval of the nonimmigrant visa petition was revoked by the director after appropriate notice. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner on a motion to reopen and reconsider. The motion will be granted and the decisions of the director and the Associate Commissioner will be affirmed.

The petitioner is a retail business specializing in the sale, lease and repair of domestic and foreign cars. It seek to continue to employ the beneficiary, its only employee, on a part-time basis as a financial analyst. The director determined the beneficiary had resigned from his position with the petitioner and was no longer in its employ.

In rebuttal, counsel submitted a letter dated July 7, 1998, from the president of the petitioning firm indicating that the temporary employment of the beneficiary began on or about February 23, 1998.

The director then determined that because the beneficiary had not attended a seminar sponsored by Price Waterhouse, his former employer and the company that sponsored him for his non-immigrant visitor visa, that the visa petition should be denied.

The record did not support the director's initial finding that the beneficiary had resigned from his position with the petitioning firm and was no longer in its employ. Nevertheless, the Associate Commissioner found another issue in this matter. The petitioner was required by regulation to provide either an approved labor condition application from the Department of Labor or certification that such application had been filed. Neither document was initially submitted.

The record now contains an approved labor condition application which was forwarded by the petitioner on appeal. However, the application was certified on December 2, 1997, a date subsequent to November 17, 1997, the filing date of the visa petition. Regulations at 8 C.F.R. 214.2(h)(4)(i)(B)(1) provide that before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application. Since this has not occurred, it is concluded that the petition should not have been approved.

Counsel now argues that there is no requirement that the petitioner obtain the certification prior to filing the petition. The clear language of the regulation requires that the petitioner obtain certification from the Department of Labor prior to filing the petition. Accordingly, the decisions of the director and the Associate Commissioner will be affirmed.

ORDER: The order of April 27, 1999 dismissing this appeal is affirmed.